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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 80, Original

THE STATE OF COLORADO,
Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,
Defendants

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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SUPPLEMENTAL STATEMENT OF FACTS

The purpose of this supplemental statement is to set forth additional factual data which is relevant to statements in the brief of the State of New Mexico and to correct certain statements made in that brief.

This proceeding was undertaken by the State of Colorado pursuant to recommendations of its Colorado Water Conservation Board. The duties of that Board are set forth in the Colorado statutes, Colorado Revised Statutes 1973, title 37, article 60. Among these duties is that of protecting and asserting the interests of the State and its citizens with respect to the waters of interstate streams. In the arid regions of the Rocky Mountain West such as the region involved in this proceeding the public welfare of communities and states is inextricably bound and related to the usage of water by private citizens, by corporations and by public entities such as municipalities. The State of New Mexico in its brief at page 5 derisively says: "What's good for CF&I is good for Colorado." (Hereafter the CF&I Steel Corporation, a Colorado corporation, will be referred to as "CF&I".) This, in fact, is often true just as what is good for any other water right owner in Colorado would be good for the State. A review of the uses of water as set forth in the judgment and decree awarding the CF&I water right, i.e., irrigation, domestic, industrial, recreational and for power generation, reveals the very great public interest. The interest of Colorado in having its water resources, placed to those beneficial uses by CF&I would be no less than the interest of the State of New Mexico in the corporations it seeks to protect, i.e., Kaiser Steel Corporation, Phelps-Dodge Corporation and Vermejo Park Corporation, a wholly owned subsidiary of the Pennzoil Company.

On page 2 of its brief, the State of New Mexico states that an economy has developed from the usage of the waters

of the Vermejo River in New Mexico and that the river is "fully appropriated". Questions about the development of regional economies and as to whether or not the river is fully appropriated and the particular relevancy of such to equitable apportionment will have to be determined by the development of facts in this proceeding.

The State of New Mexico in referring (pp. 2-4, New Mexico brief) to the adjudication proceeding in Colorado which resulted in the award of a water right to CF&I has chosen to dwell at length on a ruling of the water referee which was superceded after reconsideration and replaced by an entirely different ruling which then was incorporated as the judgment and decree of the District Court In And For Water Division No. 2 of the State of Colorado. This amended ruling of the referee, in fact, found that the waters in question are in the drainage basin of the Arkansas River and, therefore, in Colorado Water Division No. 2. It then went on to list the uses to which the water would be put, which uses are mentioned above. By replacing his original ruling with his new and amended ruling which then became the judgment and decree of the court, the water referee concluded that the uses were not speculative and did constitute a bona fide conditional appropriation upon which a conditional water right could be based.

The State of New Mexico emphasizes the referee's initial ruling. The State of Colorado would point out that Colorado Revised States 1973, §37-92-203 provides for the appointment of "referees" by the Colorado water judges to assist in the processing of applications for water rights. A review of the statutory scheme contained in Colorado Revised States 1973, §37-92-302 to §37-92-304 makes it abundantly clear that the referee's ruling is only one step in the process and is subject to review and modification by the actual water judge prior to the issuance of a final decree.

On page 5 of its brief, the State of New Mexico says that there are "no actual appropriations" in Colorado. As will be indicated later, the steps taken to secure the conditional water right decreed by the Colorado District Court do, in fact, constitute the initiation of appropriations. This was recognized by the New Mexico water claimants in their United States District Court proceeding referred to below. In their complaint, and in other documents, they state that the defendant, CF&I Steel Corporation, "has commenced an appropriation" of water in Colorado. Indeed that was the entire basis for the injunctive action in the United States District Court.

The proceeding in the United States District Court for the District of New Mexico, i.e., *Kaiser Steel Corporation et al. v. CF&I Steel Corporation,* (Civil No. 76-244 D.N.M. 1978), is interesting in relation to the involvement of the State of New Mexico which moved to appear as amicus curiae stating that New Mexico "has both governmental and proprietary interests" in the Vermejo River and that it is a function of the New Mexico Interstate Stream Commission "to protect the interests of the State of New Mexico in such streams." The motion then went on to ask that the State of New Mexico be permitted to appear "for the purpose of ensuring that this Court is promptly and reliably informed as to the status of interstate meetings and/or negotiations, if any, as to the waters of the Vermejo River, and for such other purposes as may be appropriate to enable the Court to adjudicate this cause of action." The motion was granted.

When the State of Colorado sought to appear in the New Mexico proceeding it stated that a portion of the waters of the Vermejo River in Colorado "are subject to a valid decree of the Colorado water courts and the movant has a strong interest in the protection of its courts and their decrees" and further stated that it sought to appear "to inform the Court of possible legal proceedings to ensure that the decrees of her

(Colorado's) courts are protected and that a proper apportionment of the interstate waters of the Vermejo River is achieved", interstate compact negotiations having been terminated by the State of New Mexico. Colorado was denied the right to appear. In that proceeding, the judge issued an injunction by way of summary judgment precluding diversions in Colorado.

The State of New Mexico, as indicated, apparently considered the interstate negotiations a matter of great importance. It insisted that it come into the United States District Court proceeding so that the court could be fully advised in regard to these negotiations. It participated in a full day of negotiations involving presentations by all parties concerned, deliberations, and finally termination by the State of New Mexico. The State of Colorado urged that the negotiations continue and that in the interest of resolving the various rights and claims with respect to the waters of the interstate stream a program of stream measurement be undertaken so that the parties would know exactly what they were talking about.

On page 7 of its brief, New Mexico says "Colorado seeks not an equitable apportionment, but rather an avaricious apportionment". It is respectfully suggested that avaricious is a term no more applicable to Colorado than to New Mexico in this case in that each state is seeking to protect the valid rights of its citizens. If, however, the word avaricious were applicable, it would seem more so to the State of New Mexico which seeks to preclude *any* usage by Colorado of the waters in this interstate stream.

THE NATURE OF A COLORADO WATER RIGHT

The State of New Mexico in its brief continuously refers to the Colorado water right that was granted to CF&I, as set forth above, as an "inchoate right" or a "paper right." New

Mexico apparently seeks to imply that it is not a right which would be recognized or which has any current strength or validity. Why New Mexico would not simply refer to the right as a conditional water right so that this Court would be properly informed is not clear.

Colorado, as do most western states, follows the doctrine of prior appropriation with respect to the use of the water from streams. Under the doctrine in Colorado two types of water rights may be awarded, a conditional water right and a water right. These terms are defined in Colorado statutes, Colorado Revised Statutes 1973, §37-92-103.

The purpose of a conditional water right, which is the type of water right awarded to CF&I in the proceeding referred to above, is to provide a certainty as to the right to use water upon the completion of a project for the development of such use. It is a procedure particularly appropriate, for example, with respect to the acquisition of water rights for large municipal projects involving considerable expense wherein the municipality desires to be sure that if it completes the project it will have a water right for the particular water involved. Thus, a municipality or other claimant would go into court, present its plans for development and secure a conditional water right which in effect would say that the claimant is presently assured that it may use water under a given priority date if it completes its project with reasonable diligence. Upon the completion of the project, the "conditional water right" is then converted to a "water right."

There is no question but that a conditional water right is a vested water right that is firm and clear and specific as to its terms, conditions and details and not inchoate. It is a right which cannot be taken away by any official or any other claimant unless the owner of the conditional water right fails to complete the project with reasonable diligence.

The statutory law of Colorado with respect to conditional water rights is largely found in Colorado Revised Statutes 1973, title 37, article 92. A review of Part 4 of that article, entitled "Publication of Priorities," makes it abundantly clear that water rights and conditional water rights are treated equally and tabulated jointly for purposes of water administration. *See* Colorado Revised Statutes 1973, §37-92-401.

The State of New Mexico in its brief (p. 17) refers to the case of *Washington v. Oregon*, 297 U.S. 517 (1936), wherein this Court held that because a water right in the State of Washington had not been used for 50 years it had been abandoned and, therefore, would not be recognized as a vested right entitled to consideration in an equitable apportionment controversy between the two states. The complete distinction between that case and this case is that Washington by reason of its abandonment of a water right in effect had no water right, whereas Colorado has a vested right, *i.e.*, the conditional water right decreed to CF&I.

The concept of abandonment is used in different ways in different states, but essentially it means that a water right which has been acquired by appropriation, being a right to use a certain portion of the waters of a stream, may be completely lost by a failure to use such right for an extended period of time. Once this has taken place the water right has been abandoned and there is legally no water right at all. Thus, in the *Washington v. Oregon* case, Washington has no water right. In this case, Colorado has a valid vested water right.

WATER RIGHT v. WATER USE

The one contention that the State of New Mexico is really making in its brief, a contention which occurs in almost every section, is that because there has been no water use in Colorado, Colorado is precluded from claiming any

equitable right to any portion of the waters of the Vermejo River notwithstanding the fact that these waters originate in Colorado. New Mexico acknowledges, as indeed it must under *Nebraska v. Wyoming*, 325 U.S. 589 (1945), that priority of appropriation alone does not control as between the rights of two states on an interstate stream and that, therefore, if there was a water use in Colorado even under a water right junior to New Mexico water rights there could and should be consideration of equitable apportionment. This contention of the State of New Mexico that there must be water use and not just a water right is wrong generally and it is particularly wrong in relation to the facts of this case.

The general wrong is that a Colorado water right is a vested property right which is entitled to protection as any other property right. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938). Since it is a property right any consideration of the rights of states in and to the waters of a stream must necessarily account for it. Water use is simply an aspect of a water right or a conditional water right. The right to use is just as firm with respect to a conditional water right as it is with respect to a water right. In the case of a water right, the right to use may be lost by abandonment, *i.e.*, a particular period of non-use. In the case of a conditional water right, the right to use may be lost by a failure to diligently proceed with its full development. In either case it is an absence of activity for a significant period of time.

The particular wrong in this case is that the summary judgment entered by the United States District Court in New Mexico precludes usage of water in Colorado under the water right decreed by the Colorado court. (See New Mexico brief, p. 6). Thus, Colorado by court decree is precluded from using the water which use New Mexico now says is essential to any right to equitable apportionment. In the New Mexico United States District Court case the court said that it could not consider equitable apportionment and that it could only

determine the case on the basis of priority of appropriation. Now in the Supreme Court, New Mexico acknowledges that priority of appropriation is not the controlling factor as to equitable apportionment, and asserts that only actual usage of the water can be considered in equitable apportionment. In short, the argument is circular.

A STATE SITUATED ON AN INTERSTATE STREAM HAS THE RIGHT TO AN EQUITABLE APPORTIONMENT OF THE WATERS OF THAT STREAM

The case of *Nebraska v. Wyoming*, *supra*, is perhaps the most basic decision of this Court with respect to the rights of states to an equitable apportionment of the waters of an interstate stream and with respect to the proposition that priority of appropriation will not alone control. However, it is most interesting that several of the other cases cited by New Mexico in its brief stand for this same proposition. For example, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), (p. 13 of New Mexico's brief) says that disputes as to interstate waters "are to be settled on the basis of equality of right" but that this does not mean "there must be an equal division of the waters on an interstate stream." Another significant quote is from the case of *Wyoming v. Colorado*, 259 U.S. 419 (1922) (p. 18 of New Mexico's brief) wherein it was said: "The river through its course in both States is but a single stream wherein each State has an interest which should be respected by the other."

An acknowledgement by the State of New Mexico of the relevance and propriety of equitable apportionment with respect to the waters of the Vermejo River is in the interstate negotiations which took place and the need that the State of New Mexico saw to protects its interest by advising the United States District Judge for the District of New Mexico with respect to such negotiations. The State of New Mexico participated in two meetings with representatives of the

State of Colorado for the sole purpose of discussing equitable apportionment.

New Mexico at page 8 of its brief would suggest that there is something unusual about an upstream state instituting a proceeding in the Supreme Court for equitable apportionment of the waters of a stream. There is nothing in the case law on equitable apportionment which limits actions of this sort to those brought by a downstream state.

COLORADO SEEKS A DAY IN COURT

All that Colorado seeks in this proceeding is its day in court on the question of equitable apportionment. The United States District Court for the District of New Mexico declined to look into the question of equitable apportionment, interstate negotiations with respect to equitable apportionment have been terminated unilaterally by New Mexico, and the only forum that is available or appropriate to settle this matter is this Court.

No facts have been developed, no evidence has been adduced in any proceedings that bear specifically and directly on the equities. With respect to the waters of this interstate stream and the equitable apportionment thereof, the case in the United States District Court for the District of New Mexico turned solely on the priority of appropriation and was disposed of by summary judgment. Many facts were discussed in the interstate negotiations but there was no judge or jury. One side concluded that it was not in its interests to continue.

In the case of *Connecticut v. Massachusetts, supra*, cited on p. 26 of New Mexico's brief, it is said that there must be "clear and convincing evidence" and that is precisely what we are seeking here. In that case there had been findings of a master appointed to look into the facts and develop the

evidence. Were this Court to turn down Colorado's request to file a complaint without any development of the facts or evidence pertaining to equitable apportionment, such would indeed be a denial of Colorado's rights under the Constitution and the cases cited even by New Mexico in its brief.

What New Mexico is here asking in its brief is that this Court on the basis of statements made in that brief and without any real development of facts as to water rights and water uses in New Mexico, turn down Colorado's request for a hearing. It may be that this court will conclude that Colorado is entitled in equity to less water than it claims. But at the present time there is no factual basis in terms of "clear and convincing evidence" on which to determine the equities of equitable apportionment.

Colorado believes that by virtue of its position and status on this interstate stream it is entitled to have its citizens use a portion of the waters thereof notwithstanding uses that may be taking place in New Mexico. Colorado respectfully submits that one state cannot by claiming under its laws, water rights and uses for the entire flow of the stream preclude another state situated on that stream from claiming with propriety certain rights. The controlling principle was well stated in *New Jersey v. New York*, 283 U.S. 336, 342 (1931), as follows:

> It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of and interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminshed. Both States have real and substantial interests in the River that must be reconciled as best as they may be.

It was suggested by New Mexico in its brief (pp. 10, 11) that Colorado is simply seeking by this action to set aside the injunction that was issued by the United States District Court for the District of New Mexico. This Court has enjoined private litigation such as that in connection with its consideration of equitable apportionment between the states as in *Colorado v. Kansas*, 320 U.S. 383 (1943). The objective of Colorado is to obtain its equitable portion of the waters of the Vermejo River. Such equitable portion can only be established by decision of this Court after a complete investigation of all the facts that pertain to the equities. Any judgment of the United States District Court for the District of New Mexico or of any other court would be subject to the judgment of this Court establishing such equitable apportionment and it is only in that sense that Colorado seeks to affect the judgment of the United States District Court for the District of New Mexico. Setting aside that judgment alone, whether accomplished by the 10th Circuit Court of Appeals on appeal or by this Court, will not solve the problem. It is only by means of this original proceeding between Colorado and New Mexico that equitable apportionment can be achieved and the interstate controversy resolved.

CONCLUSION

The motion for leave to file the complaint in this cause should be granted.

J. D. MacFARLANE
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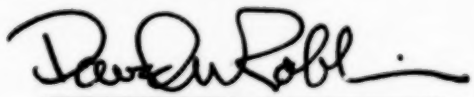

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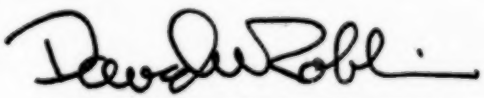
PROOF OF SERVICE

I, DAVID W. ROBBINS, Deputy Attorney General, State of Colorado, one of the Attorneys for the Complainant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the first day of November, 1978, I served copies of the foregoing Reply Brief in Support of Motion for Leave to File Complaint, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico.



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